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October 26, 1994

EX PARTE OR LATE FILED

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OCT 26 1994

William F. Caton  
Acting Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, NW  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Written Ex Parte Presentations - PP Docket No. 93-253

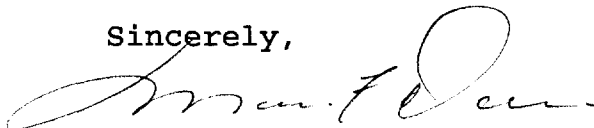
Dear Mr. Caton:

Cook Inlet Region, Inc. ("CIRI") hereby gives notice of written ex parte presentations in the above-referenced proceeding. The presentations were made in the form of the attached memorandum.

CIRI delivered the attached memorandum to General Counsel William E. Kennard, to individuals in the office of Commissioner Ness, and to individuals in the Private Radio Bureau.

Two copies of the memorandum are submitted herewith pursuant to Section 1.1206(a)(1) of the Commission's Rules, 47 C.F.R. § 1.1206(a)(1) (1993).

Sincerely,



Mark F. Dever

Enclosures

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OCT 26 1994

EX PARTE MEMORANDUM

PP Docket No. 93-253\*

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARYSummary

To be consistent with existing Federal law governing Native Americans, the Commission cannot limit application of its tribal affiliation exemption without finding that tribes are likely to obtain a "substantial unfair competitive advantage." The Commission has elected not to make such a finding. That election is wise because attempting to make such a finding would entail extensive fact-finding regarding the entire universe of potential designated entities, overcoming an extensive existing record demonstrating tribal disadvantage, and avoiding express congressional mandates.

Analysis

In its Order on Reconsideration in the spectrum auction proceeding,<sup>1</sup> the Commission clarified its entrepreneurs' block affiliation rules to include the affiliation exemption for Indian tribes and Alaska Native corporations mandated by Congress and maintained by the Small Business Administration ("SBA"). The Commission noted that the SBA is required by statute to determine the size of a business concern owned by a tribe without regard to the concern's affiliation with the tribe.<sup>2</sup> More importantly, the Commission observed that "Indian tribes and Alaska native corporations are unique aggregations of very limited capital of historically disadvantaged people."<sup>3</sup> In recognition of this special status, and to ensure that its entrepreneurs' block policies are consistent with other Federal law, the Commission adopted the SBA's affiliation exemption.

Soon thereafter, Cook Inlet Region, Inc. ("CIRI") filed a Petition for Further Clarification to ensure that there remained no ambiguity regarding full application of the tribal affiliation exemption. CIRI asked the Commission to confirm that, consistent with Federal policy, its affiliation exemption applied to all

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\* Two copies of this Memorandum have been submitted to the Office of the Secretary for inclusion in the record of this proceeding.

<sup>1</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Order on Reconsideration, FCC 94-217 (rel. Aug. 15, 1994) ("Order on Reconsideration").

<sup>2</sup> Id. at ¶ 4.

<sup>3</sup> Id. at ¶ 6 (footnote omitted).

size determinations within the Commission's entrepreneurs' blocks — including small business size qualifications.

The Commission acknowledged in the Order on Reconsideration that Section 7(j)(10)(J)(ii)(II) of the Small Business Act permits the SBA to consider limiting the application of the tribal affiliation exemption only where the SBA determines that a tribal concern is likely to obtain a "substantial unfair competitive advantage within an industry category."<sup>4</sup> In the Order on Reconsideration the Commission did not attempt to perform such an analysis or to establish the extensive factual record that would be required to support such a determination. The Commission neither reviewed the particular industry category nor examined the effect that the SBA's affiliation exemption would have on the ability of tribes to compete in emerging spectrum-based services. Indeed, the Commission found, "We do not believe it is necessary to make such a determination for broadband PCS auctions."<sup>5</sup>

The Commission thus recognized that a finding of "substantial unfair competitive advantage" would be necessary under existing Federal law in order to limit application of the tribal affiliation rule. The Commission then found that making any such determination was not necessary. Had the Commission chosen to undertake the fact-finding process, it is unlikely that it would have arrived at the requisite finding. This is so for four reasons:

- (1) The record currently before the Commission demonstrates that tribes have no competitive advantage. The record shows that Indian tribes and Native corporations face considerable social problems and substantial barriers when attempting to access traditional capital markets;
- (2) The fact-finding process would be arduous and extensive. Findings of relative competitive advantage are notoriously detailed and extensive. The process would entail a detailed examination of not only potential tribal bidders, but of all other PCS competitors (e.g., small business consortia);

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<sup>4</sup>. Id. at ¶ 7. See also 15 U.S.C.A. § 636(j)(10)(J)(ii)(II) (West Supp. 1994).

<sup>5</sup>. Order on Reconsideration at ¶ 7 (footnote omitted).

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Analysis

In its Order on Reconsideration in the spectrum auction proceeding,<sup>1</sup> the Commission clarified its entrepreneurs' block affiliation rules to include the affiliation exemption for Indian tribes and Alaska Native corporations mandated by Congress and maintained by the Small Business Administration ("SBA"). The Commission noted that the SBA is required by statute to determine the size of a business concern owned by a tribe without regard to the concern's affiliation with the tribe.<sup>2</sup> More importantly, the Commission observed that "Indian tribes and Alaska native corporations are unique aggregations of very limited capital of historically disadvantaged people."<sup>3</sup> In recognition of this special status, and to ensure that its entrepreneurs' block policies are consistent with other Federal law, the Commission adopted the SBA's affiliation exemption.

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The Commission thus recognized that a finding of "substantial unfair competitive advantage" would be necessary under existing Federal law in order to limit application of the tribal affiliation rule. The Commission then found that making any such determination was not necessary. Had the Commission chosen to undertake the fact-finding process, it is unlikely that it would have arrived at the requisite finding. This is so for four reasons:

- (1) The record currently before the Commission demonstrates that tribes have no competitive advantage. The record shows that Indian tribes and Native corporations face considerable social problems and substantial barriers when attempting to access traditional capital markets;
- (2) The fact-finding process would be arduous and extensive. Findings of relative competitive advantage are notoriously detailed and extensive. The process would entail a detailed examination of not only potential tribal bidders, but of all other PCS competitors (e.g., small business consortia);

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<sup>4</sup>. Id. at ¶ 7. See also 15 U.S.C.A. § 636(j)(10)(J)(ii)(II) (West Supp. 1994).

<sup>5</sup>. Order on Reconsideration at ¶ 7 (footnote omitted).

- (3) A finding of "unfair" competitive advantage would be difficult to sustain. Congress has directed that "[f]or all purposes of Federal law", tribes and Native corporations are "disadvantaged" minority businesses. This mandate creates an exceptionally high hurdle for a finding of "unfair" competitive advantage obtained by Indian tribes and Native corporations;
- (4) A finding of unfair competitive advantage for "unique aggregations" of poor people is virtually precluded by the existence of small business consortia of unlimited size. Indian tribes and Native corporations — whose typical shareholder has an annual income below the national poverty level — are unlikely to have a competitive advantage over the unlimited consortia of individuals each worth up to \$40 million permitted under the Commission's entrepreneurs' block rules.

Without having made a finding of substantial unfair competitive advantage, the Commission cannot limit the application of its tribal affiliation exemption to general entrepreneurs' block eligibility determinations. Rather, to be consistent with congressional direction and SBA regulations, the Commission should confirm that the tribal affiliation exemption applies to all size determinations within the entrepreneurs' blocks.

- (3) A finding of "unfair" competitive advantage would be difficult to sustain. Congress has directed that "[f]or all purposes of Federal law", tribes and Native corporations are "disadvantaged" minority businesses. This mandate creates an exceptionally high hurdle for a finding of "unfair" competitive advantage obtained by Indian tribes and Native corporations;
- (4) A finding of unfair competitive advantage for "unique aggregations" of poor people is virtually precluded by the existence of small business consortia of unlimited size. Indian tribes and Native corporations — whose typical shareholder has an annual income below the national poverty level — are unlikely to have a competitive advantage over the unlimited consortia of individuals each worth up to \$40 million permitted under the Commission's entrepreneurs' block rules.

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